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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause empowers Congress to regulate a fly with no commercial value that is located exclusively within a limited area of a single state.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector, and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates its members' views in court on issues of national concern to the business community. Chamber activities frequently involve the representation of the interests of its members in property rights and land use matters before the courts, the U.S. Congress, the executive branch, and independent regulatory agencies of the Federal government. The Chamber has participated as *amicus curiae* in a number of cases involving environmental issues, including *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Chamber and its member companies are committed to the goals of the Endangered Species Act (the "ESA") and other federal environmental laws. To that end, and in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

coordination with state and federal regulatory authorities, the Chamber's member companies have spent vast sums to comply with federal environmental laws and regulations, and have consulted on countless occasions with the federal agencies charged by Congress with implementing the ESA.

This case is significant not only because of its importance to the reach of the ESA, but also because the definition "interstate commerce," and the scope of Commerce Clause power over private land use and other intra-state activities, are vitally important issues to the business community.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interests of business in this case.

ARGUMENT

This case concerns the federal government's efforts to save the Delhi Sands Flower-Loving Fly from extinction. The petition for certiorari seeks Supreme Court review to save existing Commerce Clause doctrine from extinction, for if the Court of Appeals properly construed the scope of the Commerce Clause, there is virtually no limit to the powers of the federal government.

This case presents issues more far-reaching and complex than *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court held that the Gun-Free School Zones Act exceeded Congressional authority under the Commerce Clause. In *Lopez*, the facts presented relatively straightforward questions of Commerce Clause authority, because the activity Congress sought to regulate—possession of a gun in a local school zone—"is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. In contrast, this case involves federal regulation of an insect with no commercial value that is located exclusively within a limited area of a

single state, on the grounds that (1) Congress has assigned it to the same class as other species that have a substantial relationship to interstate commerce; (2) there have been minimal commercial transactions involving the insect in the past, and there may be some undefined commercial value for the insect in the future; (3) the insect is connected through the biological relationships of its ecosystem to other species with a relationship to interstate commerce; (4) Congress has made findings that support assertion of Commerce Clause power; and (5) moral issues bearing on extinction of species warrant consideration in determining the scope of the Commerce Clause.

At the end of the twentieth century, there is no question that rapidly changing notions of interstate commerce challenge traditional concepts of Commerce Clause authority. But the well-intentioned theories adopted by the Court of Appeals would eviscerate traditional learning that the Commerce Clause power requires an established relationship between regulated activity, interstate activity and commerce. The Chamber is concerned that these limitations on the federal power must be preserved, to protect the rights of private businesses and landowners from illegitimate federal interference. For the reasons set forth below, the Chamber respectfully submits that this case raises numerous significant issues that warrant Supreme Court review.

I. The Court Should Grant The Petition To Clarify The Scope Of Commerce Clause Power To Regulate Intrastate Activity That Congress Classifies Together With Interstate Activity

The Court should grant the petition to clarify the scope of Commerce Clause power to regulate intrastate activity that Congress classifies together with interstate activity. The Court has held that the Commerce Clause power extends to intrastate activity that is a trivial part of a class of activities

that bear a substantial relation to interstate commerce. "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). Similarly, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." *Maryland v. Wirtz*, 392 U.S. at 197 n.27. This case gives the Court an important opportunity—not present in *Lopez*—to refine existing doctrine and clarify the extent to which the Commerce Clause reaches intrastate activity that Congress assigns to a larger class of interstate activity.

Unlike *Lopez*, which involved regulation of matters that could *never* plausibly be construed as part of a class of activity that substantially affects interstate commerce, this case involves intrastate activity with a complex (though attenuated) relationship to interstate commerce. The Fly at issue in this case is confined to a small region within a single state, does not move across state lines (either on its own or because of commercial trading) and is not the subject of commercial transactions. But other endangered species do have an effect on interstate commerce, at least in part because they dwell in several states or migrate across state lines. Some endangered species also are the source of commercially valuable products. *See* H.R. REP. NO. 93-412 (1973), *reprinted in* SENATE COMM. ON ENV'T. AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 144-45 (1982). Judge Wald concluded that these *other* species' relationship to interstate commerce justifies extension of Commerce Clause power to the Fly:

> Because section 9(a)(1) of the ESA regulates a *class of activities* -- takings of endangered species -- that is within Congress' Commerce Clause power under both the first and third *Lopez* categories, application of section 9(a)(1) to the Fly is constitutional.

National Ass'n of Home Builders v Babbitt, 130 F.3d 1041. 1046 (D.C. Cir 1997) (emphasis added).

Judge Wald's analysis raises the critical question whether Commerce Clause power over intrastate activities extends far beyond the Court's existing precedents. *First*, her analysis presents the question whether Congress can invoke Commerce Clause power over intrastate activity when it comprises *more* than a trivial or "*de minimis*" part of the class of activity subject to regulation. *Cf. Perez*, 402 U.S. at 154 *supra*. Although some endangered species have been articles of interstate commerce in the past, there is no indication in the record that this is true of most species, nor does the government consider interstate commerce when it lists species as endangered. The Court should grant the petition, because the facts of this case present an unusual opportunity to determine whether Congress can regulate a class of activity involving a substantial amount of intrastate activity.

Second, Judge Wald's analysis presents the Court with the opportunity to clarify whether the Commerce Clause power can reach intrastate activity solely because Congress has classified it together with unrelated interstate activity. There is no nexus between the intrastate activity of the Fly and the interstate activities of other endangered species, yet Judge Wald held that "takings of endangered species" was a class of activity subject to regulation under the Commerce Clause, without regard to the interstate activity of any particular species. 130 F.3d at 1046. Surely the Commerce Clause does not allow Congress to define the scope of its own power by grouping activities beyond the scope of its constitutional authority together with activities involving interstate

commerce. This case presents the Court with an excellent opportunity to address the limitations the Commerce Clause places upon such Congressional actions.

II. The Court Should Grant The Petition To Resolve Whether The Commerce Clause Power Reaches Intrastate Activities With Remote or Speculative Connections To Interstate Commerce

The Court also should grant the petition to determine the extent to which the Commerce Clause power reaches intrastate activity with remote or speculative connections to interstate commerce. This Court's prior decisions have insisted upon a direct connection between intrastate activity and interstate activity. In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the Court affirmed the constitutionality of regulations governing consumption of home-grown wheat, because regulation of that intrastate activity was a necessary element of the uniform nationwide regulation of wheat. Similarly, in *Perez*, 402 U.S. 146, the Court held that Congress had Commerce Clause power to criminalize intrastate extortionate credit transactions that financed organized crime because of the pervasively interstate and international character of organized crime and its direct financial effects upon the national economy. But in the present case, any association between the Fly and interstate commerce is extraordinarily attenuated and speculative. The case therefore presents the Court with the opportunity to reach beyond its prior decisions and further elucidate the scope of Commerce Clause power.

This case presents the Court with three separate issues that could clarify the extent to which Congress can use its Commerce Clause power to regulate activity with remote or speculative connections to interstate commerce. *First*, the case raises the extent to which *past* interstate commercial

transactions authorize Congress to regulate current activity that is exclusively intrastate. Although the Court of Appeals held otherwise, 130 F.3d at 1046, the District Court held that the Fly was "an article in interstate commerce," because there was historical "interstate commercial trading in the Fly" which "halted once it was declared 'endangered' by the Secretary." *National Ass'n of Home Builders v. Babbitt*, 949 F. Supp. 1, 8 & n.17 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.C. Cir. 1997). The District Court's holding derived from a record containing evidence of only two sales transactions, involving a total of five Flies, which yielded a total revenue of $10.00. Reply Brief for Appellants, at 4. The Court should grant the petition to clarify whether intrastate activity can be regulated because of prior related interstate commercial transactions, and if so, whether a history of merely trivial interstate transactions justifies assertion of Commerce Clause power by Congress.

Second, this case raises the question whether the speculative possibility of *future* interstate commercial transactions justifies assertion of Commerce Clause power over activity that currently is exclusively intrastate. Judge Wald's opinion recognizes that certain endangered species such as the Fly have no present commercial use, but nevertheless affirms Commerce Clause power over them because they may have *possible* commercial value in the *future*. Judge Wald explains that species "lost through extinction undoubtedly have economic uses that are, in some cases, as yet unknown," and that a species "whose worth is still unmeasured has what economists call an 'option value' -- the value of the possibility that a future discovery will make useful a species that is currently thought of as useless." 130 F.3d at 1053. Judge Wald therefore held that there was "a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource -- biodiversity." *Id.* at 1054. Judge Henderson properly concluded that under Judge Wald's analysis, it is "impossible

to ascertain" whether endangered species with no current commercial value will develop such value in the future. *Id.* at 1058. This case therefore presents the Court with an excellent opportunity to define the extent to which future interstate commercial activity justifies present assertion of Commerce Clause power, and if so, the extent to which such future activity may be wholly speculative.

Third, this case presents the Court with the opportunity to address the novel theory, espoused by Judge Henderson, that the Commerce Clause reaches intrastate activity connected to interstate activity exclusively through the biological relationships of an ecosystem. As noted above, this Court's prior decisions hold that the Commerce Clause power reaches intrastate activity that bears some *economic or commercial* relationship to interstate activity. *See Wickard*, 317 U.S. at 128 (discussing economic or commercial relationship of home-grown wheat to interstate wheat market); *Perez*, 402 U.S. at 154-57 (discussing economic or commercial relationship between intrastate extortionate credit transactions, organized crime, and the national economy). Judge Henderson's concurring opinion extends far beyond these precedents, holding that because of "the interconnectedness of species and ecosystems," "the extinction of one species affects others and their ecosystems and . . . the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce." 130 F.3d at 1059 (Henderson, J., concurring). In Judge Henderson's view, because Congress can regulate species that affect interstate commerce, it can regulate all other species that contribute to the seamless web of life.

The novel theory espoused by Judge Henderson raises profoundly important questions regarding the scope of Commerce Clause power. Given that human beings are a single species with its own biological relationships to an

ecosystem, does the Commerce Clause allow regulation of any human endeavor simply because *other* species are the subject of interstate commercial transactions? Does the fact that *some* human activity involves interstate commerce mean that *any* activity involving the same (human) species is subject to the Commerce Clause power? If Congress can legislate to prevent the killing of all endangered species that are part of a single ecosystem, why can it not protect children endangered by firearms through a statute like the one invalidated in *Lopez*? Does Congress have authority to regulate a matter such as biodiversity because of its manifest importance, even though it has a tenuous relationship to interstate commerce? If loss of a species has a *de minimis* effect on its ecosystem, should regulation be authorized? The Court should grant the petition to answer these important questions that arise from the Court of Appeals opinion.

III. The Court Should Grant The Petition To Clarify The Appropriate Degree Of Judicial Deference To Congressional Findings That Intrastate Activity Affects Interstate Commerce

This Court's decisions establish that "a court reviewing whether a particular exercise of congressional power is valid under the Commerce Clause" must "defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). This case presents an important opportunity to clarify the appropriate degree of judicial deference to Congressional findings that intrastate activity affects interstate commerce and is therefore within the scope of Commerce Clause power. *Lopez* did not present this issue, because the statute challenged in that case had no Congressional findings addressing effects on interstate commerce. *Lopez*, 514 U.S. at 562. In contrast, the statutory

provision at issue in this case has Congressional findings that the Court of Appeals relied upon to distinguish the case from *Lopez* and to find an impact upon commerce. 130 F.3d at 1051. Because the Fly's relationship to interstate commerce is so tenuous, *see supra*, this case presents the Court with an excellent test case to clarify the extent to which Congressional findings can justify assertion of Commerce Clause power.

In particular, this case presents the question whether Congressional findings regarding interstate commerce fundamentally affect analysis of the issues set forth above in Sections I and II. *First*, the case allows this Court to address the extent to which Congressional findings can justify regulation of intrastate activity that Congress assigns to the same class as interstate activity (as described in Section I above). In the ESA's legislative history, Congress noted that commerce in some species hastened their extinction. H.R. REP. NO. 93-412, *supra*, at 144. The Court of Appeals used the ESA's legislative history regarding these other species (associated with interstate commerce) to justify assertion of Commerce Clause power over the Fly. 130 F.3d at 1050-51. This case would allow the Court to address the extent to which Congressional findings add a thumb to the scale to extend Commerce Clause power to activity that it otherwise might not reach.

Second, this case allows the Court to address the extent to which Congressional findings can "bootstrap" activity with speculative or tenuous connections to interstate commerce so that it comes within the scope of the Commerce Clause. Judge Wald's speculation about the future commercial value of some species (*see* Section II *supra*) parallels the ESA's House Report, which discusses "potential resources" which may hold the key to curing disease. H.R. REP. NO. 93-412, *supra*, at 143-44. Judge Henderson's ecosystem analysis (*see* Section II *supra*) parallels the ESA's Senate Report, which

cites "the need for biological diversity for scientific purposes" and states that "many of these animals perform vital biological services to maintain a 'balance of nature' within their environments." *See* S. REP. NO. 93-307, *reprinted in* SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 301 (1982). Judge Sentelle noted in his dissent that "[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce." 130 F.3d at 1065 (Sentelle, J., dissenting). This Court should use this case as an occasion to clarify the extent to which courts can use limited and vague Congressional findings regarding interstate commerce to validate legislation under the Commerce Clause.

IV. The Court Should Grant The Petition To Address Whether Prevention Of Immoral Acts Justifies Extending The Commerce Clause Power To Reach Intrastate Activity

The Court also should grant the petition to address whether prevention of immoral acts justifies extending the Commerce Clause power to reach intrastate activity. Judge Wald's opinion justifies protection of endangered species under "Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes." 130 F.3d at 1048. Relying on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *United States v. Darby*, 312 U.S. 100 (1941), Judge Wald concludes that "like regulations preventing racial discrimination or labor exploitation, regulations preventing the taking of endangered species prohibit interstate actors from using the channels of interstate commerce to 'promot[e] or spread[] evil, whether of a physical, moral or economic nature.'" 130 F.3d at 1048 (citing *North American Co. v. SEC*, 327 U.S. 686, 705

(1946)). This case would allow the Court to clarify whether the doctrine invoked by Judge Wald applies to activity that reasonable people might agree is moral and which has a remote and speculative association with interstate commerce.

First, this case presents the Court with the opportunity to determine whether Congress can regulate endangered species on moral grounds at all. The suggestion that use of land by its owners (and in this case by the local government itself) in a manner consistent with local laws is akin to the moral issues presented in *Heart of Atlanta* and *Darby* is, to be charitable, novel. The owners of the land being subjected to habitat regulation in this case did not set out to eradicate the Fly; instead, the effects on the Fly were completely unintentional. *See* 130 F.3d at 1061 (Sentelle, J., dissenting). And evaluation of the "morality" underlying the activity sought to be regulated is further complicated by the countervailing interests in this case. Construction of a state-of-the-art hospital in an earthquake-prone region of Southern California could easily be viewed as a moral objective, and elevating the interests of the Fly over those of this humanitarian project could be regarded as immoral. This Court should grant the petition to clarify the scope of the "morality" doctrine invoked by Judge Wald.

Second, because the facts of this case involve a remote and speculative connection between the Fly and interstate commerce, *see supra*, this case presents the Court with an excellent opportunity to clarify the extent to which Commerce Clause doctrine requires a close nexus between immoral acts and interstate commerce. This Court never has held that Congress has a general power to regulate issues of "morality" unrelated to its enumerated constitutional powers. For example, prohibition of prostitution is typically a matter of state law, yet Congress has Commerce Clause power to forbid transportation of women in interstate commerce for immoral purposes in the Mann Act. *Hoke v. United States*,

227 U.S. 308 (1913). Similarly, gambling is typically controlled by state law, yet Congress has Commerce Clause power to prohibit the interstate transportation of lottery tickets. *Champion v. Ames*, 188 U.S. 321 (1903). Thus, although *Heart of Atlanta* and *Darby* both involved important moral issues—race discrimination against hotel guests in *Heart of Atlanta*, and the establishment of minimum wages and maximum hours for laborers in *Darby*—neither decision turned upon the *morality* of the activity being regulated, but rather upon its connection with interstate commerce. Granting the petition in this case would allow the Court to determine how close the nexus must be between immoral activity and interstate commerce for the Commerce Clause power to attach.

V. The Court Should Grant The Petition To Clarify, After *Lopez*, The Relationship Between The Commerce Clause Power, The Powers Reserved To The States Under The Tenth Amendment, And The Fifth Amendment Power To Take Private Property

The Court should grant the petition to clarify, after *Lopez*, the relationship between the Commerce Clause power, the powers reserved to the states under the Tenth Amendment, and the Fifth Amendment power to take private property. *First*, this case presents an excellent opportunity to address the federalism issues implicated by the Tenth Amendment, because there are significant state interests at stake. This Court has held that regulation of land use and private property relationships has historically been a core function of state and local governments. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (zoning regulation); *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994) (land use planning). The Fish and Wildlife Service's extraordinary restrictions on use of private property in this

case therefore implicate vital federalism concerns. Furthermore, the protection of endangered species involves some matters best administered by the states. When it enacted the ESA, Congress noted that protection of endangered species requires "coherent national and international policies," but it also recognized the importance of state efforts:

> [T]he states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than there are in the Federal government.

H.R. REP. NO. 93-412, *supra*, at 146. Because the invocation of Commerce Clause power in this case involves regulation of matters of significant state concern, this case is worthy of Supreme Court review.

Second, on the other side of the federalism ledger, this case presents an excellent opportunity for the Court to address powers to regulate endangered species properly left to the federal government. Congress certainly has the authority to regulate interstate commercial transactions in endangered species that live within the United States.[2] But

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[2] Congress also has indirect authority to regulate the numerous animals and plants on the endangered species list with habitats *outside* the United States. *See* 50 C.F.R. §§ 17.11, 17.12. Although Congress does not have authority to forbid the destruction of such species as the Baluchistan bear of Iran and Pakistan, or the angulated tortoise of Madagascar (*see id.* at 103, 143) in their foreign country habitats, the federal government is able to protect those species indirectly by outlawing importation of such animals into the United States (as is done

(Footnote cont'd on next page)

the federal government also has indirect influence over intrastate endangered species properly regulated directly by the states. The federal government can encourage conservation efforts by state or local governments in the way that it achieves cooperation on other issues: by funding programs contingent upon the local governments' participation in conservation efforts. Granting the petition in this case would allow the Court to define the proper contours of federal government involvement in the regulation of endangered species.

Third, granting the petition also would allow the Court to consider the relationship of these important federalism issues to the federal government's Fifth Amendment "takings" power. It is settled law that the Fifth Amendment grants the federal government authority to take private lands through the power of eminent domain—a power that unquestionably reaches acquisitions of endangered species' habitats. *Cf. First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (discussing Fifth Amendment eminent domain authority). If the federal government regulates endangered species by "taking" their habitats, the Fifth Amendment guarantees that the private landowner in possession of the habitat will receive just compensation. *See id.* On the other hand, if the federal government succeeds in regulating the same habitat through the ESA under the Commerce Clause, the resulting

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(Footnote cont'd from previous page.)

in the ESA, *see* 16 U.S.C. § 1538(a)(1)(E)-(F)), joining international treaties to promote conservation, and conditioning foreign aid or other favored international treatment upon a nation's compliance with American standards of endangered species protection.

substantial restrictions on land use, though crippling the landowner, may not be compensable takings.

In this case, therefore, the particular constitutional source of Congressional regulatory authority makes all the difference to the private landowners with property that happens to be habitat for an endangered species. The substantial real-world consequences of limiting the Commerce Clause power to its proper bounds therefore call out for Supreme Court review in this case.

CONCLUSION

For the foregoing reasons, Court should grant the petition for certiorari.

Respectfully submitted,

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